EXPORT-IMPORT BANK OF MALAYSIA BHD v. BRAHIM'S OVERSEAS VENTURES SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AZLAN SULAIMAN JC
[SUIT NO: WA-22M-249-06-2020]
13 JUNE 2022

Abstract – *(i) An affidavit in support of an application must verify the facts on which a claim is based; and (ii) a summary judgment application is not to be decided on whether the defence or affidavits raise a triable issue but on whether, taking into account all the facts and circumstances of the case, there are triable issues. If a defendant succeeds in raising even one triable issue, then it is not a fit and proper case for the granting of a summary judgment.*

CIVIL PROCEDURE: *Summary judgment – Application for – Recovery of term loan facility – Whether claim merely recovery of term loan facility – Whether matter far more complex and intricate – Whether details sufficiently pleaded in statement of claim – Whether there were triable issues to be determined at full trial – Whether there were issues to be explored and investigated further – Whether clear-cut case – Whether application supported by affidavit verifying facts of claim – Whether safe to grant judgment summarily – Rules of Court 2012, O. 14*

CIVIL PROCEDURE: *Affidavits – Affidavit in support – Application for summary judgment – Recovery of term loan facility – Whether all material facts of claim deposed to and verified – Whether basic conditions and prerequisites satisfied – Whether mandatory requirement under O. 14 r. 2(1) of Rules of Court 2012 complied with*

The first defendant, a company involved in the trading of food-related products, had entered into a joint venture with King Abdullah II Design and Development Bureau ('KADDB') to manufacture and market shelf-to-table products, using heat treatment known as retort food pouches ('products'), through a joint venture vehicle called Arab Ready Meals PCS ('ARM'). Through ARM, KADDB and the first defendant aimed to market and supply the products in Jordan and the region. ARM had obtained a ten-year term loan from Jordan Kuwait Bank ('JKB') and JKB required further security for that loan. Upon the first defendant's application, the plaintiff approved a bank guarantee facility of Jordanian Dinar ('JOD') 4 million ('facility') to be given to JKB. The basic framework of the facility was that (i) the facility was a bank guarantee which the plaintiff would issue to JKB to guarantee compliance by ARM with the terms and conditions of the term loan facility of JOD 8 million that it had given to ARM; (ii) the plaintiff's maximum exposure to JKB was JOD4 million as the first defendant was only a 50%

shareholder of ARM; (iii) in the event JKB made a claim on the bank guarantee and the plaintiff paid on it, the plaintiff would then be entitled to claim repayment of that sum from the first defendant subject to interest; (iv) if the first defendant were unable to make full settlement of that sum, then the outstanding sum shall be automatically converted into a term loan facility of the Ringgit Malaysia equivalent of that sum; and (v) the terms and conditions of that term loan would be determined at the sole discretion of the plaintiff. All documentation relating to the facility was executed and the bank guarantee, signed by the second and third defendants, who were directors of the first defendant, was provided by the plaintiff to JKB. The insurance policy was taken out and the fixed deposit was placed with the plaintiff. In the present claim, the plaintiff, in its amended statement of claim ('amended SOC'), submitted that (i) JKB had made a claim of JOD2,773,668 on the bank guarantee and the plaintiff paid the said sum to JKB; (ii) the plaintiff demanded payment of the said sum from the first defendant but the latter failed to pay the same; (iii) this prompted the plaintiff to encash the RM1 million security deposit and to dismiss the defendants' claim on the insurance policy; and (iv) the plaintiff was now claiming the balance under the facility in the sum of RM16,312,252.05. The plaintiff, averring that it was a simple recovery of a term loan facility, applied for a summary judgment against the defendants. Opposing the plaintiff's application, the defendants contended that there were issues to be determined at the full trial of the claim and the set-off ('defendants' issues'). The plaintiff argued that its application for summary judgment should still be allowed notwithstanding the defendants' issues as (i) its rejection of the first defendant's claim on the insurance policy was valid; (ii) the first defendant's claim on the insurance policy was made after it had expired; and (iii) the defendants' allegation amounted to a counterclaim against the plaintiff's claim, which meant that the plaintiff's application could still be heard and determined and that judgment on it could still be granted.

Held (dismissing application with costs):

(1) What was glaringly absent from the amended SOC was any pleaded details on the term loan. What were the terms and conditions of the term loan, especially the terms for repayment and consequences of default? What was the equivalent of JOD2,773,668 in Malaysian Ringgit that became the amount of the term loan? The plaintiff must have known these details as, according to the letter of offer, the terms and conditions of the term loan 'shall be determined as the sole discretion of EXIM Bank'. The issue of the term loan could not be treated lightly or disregarded, more so when the certificate of indebtedness, which the plaintiff relied on against the defendants, identified the facility as being 'Term Loan Facility of RM16,313,810 (Conversion from Bank Guarantee Facility of JOD2,773,668)'. To compound this concern, the plaintiff's affidavit in support skipped altogether (i) any mention of the

claim by JKB on the bank guarantee and the payment by the plaintiff to JKB; (ii) the plaintiff's demand for payment from the first defendant and the latter's failure to pay; (iii) the encashment of the RM1 million security deposit; and (iv) the dismissal of the defendants' claims on the insurance policy. Instead, the deponent went directly to the plaintiff's claim for RM16,312,252.05. The plaintiff failed to depose to let alone verify, all the material facts of its claim on which its application was based, a mandatory requirement under O. 14 r. 2(1) of the Rules of Court 2012 ('ROC'). The plaintiff's application could, and should, be dismissed because it did not fully satisfy basic conditions and prerequisites. (paras 18-22, 24 & 27)

(2) It was not as simple as the plaintiff contended, *ie* that its application for summary judgment should still be allowed notwithstanding the defendants' issues, because: (i) the plaintiff's claim against the defendants was based on the claim that the JKB made on the bank guarantee; the details of that claim needed to be explored; (ii) the first defendant had made a claim on the renewed policy upon being notified by the plaintiff of JKB's claim on the bank guarantee. The proceeds under the renewed policy would have adequately covered JKB's claim on the bank guarantee, therefore wholly exonerating the defendants of any further liability. It would then be a set-off, not a counterclaim; (iii) whether or not the plaintiff was correct in rejecting the first defendant's claim on the insurance policy needed to be explored further and was not something that could be determined summarily on affidavit evidence; (iv) in its letter rejecting the first defendant's claim on the insurance policy, the plaintiff never contended that the insurance policy had expired. Was it an allegation made in afterthought?; and (v) even if the insurance policy had expired, the defendants relied on cases that did not make a sole ground for rejecting a claim, more so when the party taking out the insurance policy had made substantial policy payments to the insurer. The issue of the insurance policy could not be determined in a summary manner more so when all the plaintiff pleaded on it was that vague paragraph of its 'pernyataan tuntutan terpinda'. (paras 41-47 & 55)

(3) This was not a clear-cut case and it was unsafe to grant judgment summarily. This was definitely not a run-of-the-mill case of a borrower company having taken loan facilities from a bank guaranteed by its directors and then defaulting in its repayment; the facts of this case were far more complex and intricate than that. (paras 1 & 54)

Case(s) referred to:

Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC ***(refd)***

The Pacific Bank Bhd v. Kerajaan Negeri Sarawak [2015] 3 CLJ 717 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 94
Rules of Court 2012, O. 14 r. 2(1)

For the plaintiff - Alan Wong & Kavyaasrini S Mahendran; M/s Zain Megat & Murad
For the defendants - Cecil Abraham, Gurubachan Singh Johal & Qeemnor Zahreen Zazanee; M/s Nashir Johal & Co

Reported by Najib Tamby

JUDGMENT

Azlan Sulaiman JC:

Overview

[1] On 25 April 2022, I dismissed the plaintiff's application for summary judgment against the defendants. Though the first defendant was the borrower and the second and third defendants were guarantors, this was definitely not a run-of-the-mill case of a borrower company having taken loan facilities from a bank guaranteed by its directors, and then defaulting in its repayments. The facts of this case are far more complex and intricate than that, and further involved the plaintiff bank being given an insurance policy to insulate and safeguard it from any risks or fallout. In other words, in the very least there were other reasons for trial which persuaded me that, on the balance, the defendants ought not to be shut out from having their day in court.

[2] Amongst the principles of law that I considered in coming to that conclusion were:

(i) the plaintiff's affidavit in support of the plaintiff's application must verify the facts on which the claim is based;

(ii) a summary judgment application was not to be decided on whether the defence or affidavits raised a triable issue, but on whether, taking into account all the facts and circumstance of the case, there were triable issues; and

(iii) if a defendant succeeds in raising even one triable issue, then it is not a fit and proper case for granting summary judgment.

[3] Two main issues which persuaded me against granting summary judgment in this case were:

(i) the plaintiff had neither pleaded nor verified all of the facts on which the claim is based;

(ii) the issues surrounding the insurance policy provided to the plaintiff.

The Salient Facts Common To Both Issues

[4] The plaintiff is a public limited company and a wholly owned subsidiary of the Minister of Finance Incorporated. It was established to promote reverse investment and export of strategic sectors such as capital goods, infrastructure projects, shipping, value added manufactured products and to facilitate the entry of Malaysian companies to new markets, particularly to the non-traditional markets.

[5] The first defendant is a private limited company involved in the trading of food-related products. Food products under the brand name "Brahim" can commonly be seen on the shelves of our stores and supermarkets.

[6] The second and third defendants are directors and shareholders of the first defendant.

[7] In or around 2007, the first defendant entered into a joint venture with King Abdullah II Design and Development Bureau ("KADDB") to manufacture and market shelf to table food products using heat treatment known as retort food pouches ("products") through a joint-venture vehicle named Arab Ready Meals PCS ("ARM"). KADDB and the first defendant each held a 50% shareholding in ARM. Through ARM, they would combine the first defendant's expertise and know-how in the manufacture, production and supply of the products with KADDB's expertise, resources and relationships in Jordan to market and supply the products in Jordan and the Region.

[8] By 2012, ARM had procured a contract with the Jordan Armed Forces (JAF) to supply ration packs to three military camps. ARM had also obtained a ten-year term loan from Jordan Kuwait Bank to assist it in running ARM's business. It was Jordan Kuwait Bank that wanted further security for that loan.

[9] On the first defendant's application, by a letter of offer dated 9 May 2011 ("the letter of offer"), the plaintiff approved to the first defendant a bank guarantee facility of Jordanian Dinar Four Million (JOD4,000,000) ("the facility") subject to the terms and conditions in appendices 1 and 2 annexed to the letter of offer. That bank guarantee was to be given to Jordan Kuwait Bank.

[10] The salient terms from appendix 1 of the letter of offer were:

> 4. Purpose: To guarantee financial performance of the Customer as a Fifty Percent (50%) shareholder in a company called Arab Ready Meals, PSC (hereinafter shall be referred to as "ARM") in which ARM has been granted a Ten (10) year term loan facility of Jordanian Dinar Eight Million (JD8,000,000) by Jordanian Kuwait Bank
>
> 5. Beneficiary: Jordan Kuwait Bank, PLC (hereinafter shall be referred to as "JKB" or "the Beneficiary")

A 11. Security: The Security for the facility shall include but not limited to;

(a) An Irrevocable and Unconditional Joint and Several Guarantees and Indemnity from the following persons:

Name	IC No/Passport No
B Ibrahim bin Haji Ahmad	470713-07-5181
Nur Fatin bin Ibrahim	781128-14-5992

(b) Subscription of Political Risk Insurance from an insurance company acceptable to EXIM Bank; and EXIM Bank is named as beneficiary. In the event that EXIM Bank cannot by any reason whatsoever to C be named as beneficiary to the insurance policy, an Assignment shall be created in favour of EXIM Bank

(c) Fixed Deposit amounting to Ringgit Malaysia One Million (RM1,000,000) shall be placed with EXIM Bank during the tenor of the facility

D 12. Additional Conditions Precedent: EXIM Bank shall have received the supply contract/ agreement between ARM and Jordanian Armed Forces (JAF) for the supply of ration packs/pouches.

13. Specific Covenant: The Borrower shall ensure that JKB will forward a documentary evidence pertaining to ARM's Conduct E of account on half yearly basis to EXIM Bank.

[11] Item 3 of appendix 2 to the letter of offer, under the heading/category "payment of claim" expressly provided:

In the event any of the bank guarantee being called upon by the Beneficiary, for the amount claimed and notwithstanding any objections F by the Customer or any dispute arising between the Customer and the Beneficiary in respect of the said bank guarantee, the Customer shall pay and discharge EXIM Bank upon notice in writing from EXIM Bank in respect of the aforesaid bank guarantee. Any amount of claim paid by EXIM Bank to the Beneficiary that remains unpaid by the Customer shall be charged interest at the rate of Two Percent (2%) per annum above G EXIM Bank's Cost of Fund, up to the date of full settlement. EXIM Bank also reserves the right to debit the Customer's account for the amount claimed.

EXIM Bank's Cost of Fund which is EXIM Bank's borrowing cost shall either be based on LIBOR, TIBOR or SIBOR plus the cost of borrowing H or any other rate that is to be determined by EXIM Bank at its absolute discretion.

Notwithstanding the above, in the event the Customer is unable to make full settlement of the crystallised or claimed amount, the outstanding crystallised or claimed amount under the facility shall be automatically I converted into a term loan at Ringgit Malaysia (RM) equivalent amount at the prevailing rate, of which the terms and condition shall be determined at the sole discretion of EXIM Bank.

[12] Item 9 of appendix 2 to the letter of offer, under the heading/category "event of default, covenants, representations & warranties" expressly provided:

> The usual events/covenants/representations and warranties required of a facility of this nature, subject to the formalisation of legal documentation.

[13] From these terms of the letter of offer, the basic framework of the facility was:

(i) the facility was a bank guarantee which the plaintiff would issue to Jordan Kuwait Bank to guarantee compliance by ARM with the terms and conditions of the term loan facility of Jordanian Dinar Eight Million (JD8,000,000) it had given to ARM;

(ii) the plaintiff's maximum exposure to Jordan Kuwait Bank was JD4,000,000, as the first defendant was only a 50% shareholder of ARM;

(iii) in the event Jordan Kuwait Bank made a claim on the bank guarantee and the plaintiff paid on it, then the plaintiff would be entitled to correspondingly claim repayment of that sum from the first defendant subject to interest;

(iv) if the first defendant were unable to make full settlement of that sum, then the outstanding sum shall be automatically converted into a term loan facility of the Ringgit Malaysia equivalent of that sum;

(v) the terms and conditions of that term loan would be determined at the sole discretion of the plaintiff.

[14] All documentation relating to the facility was duly executed. The bank guarantee was duly provided by the plaintiff to Jordan Kuwait Bank. The second and third defendants signed the guarantee. The insurance policy was taken out and the fixed deposit was placed with the plaintiff.

Issue 1: The Plaintiffs Failure To Plead And Verify All Of The Facts On Which The Claim Is Based

[15] In paras. 1 to 17 of the plaintiff's pernyataan tuntutan terpinda, the plaintiff set out the parties, what it believed were the material facts of the case, and the details of the security documents.

[16] In the remaining paras. 18 to 30 of the pernyataan tuntutan terpinda, the plaintiff set out what I call the facts which give rise to the claim:

> 18. Pada atau sekitar 28.02.2019, benefisiari tersebut, iaitu Jordan Kuwait Bank telah menuntut ke atas Kemudahan tersebut daripada Plaintif sebanyak Jordan Dinar J0D2,773,668.

19. Selaras dengan terma-terma dan syarat Perjanjian Kemudahan tersebut, pada atau sekitar 01.03.2019, Plaintif telahpun melepaskan bayaran penuh kepada benefisiari tersebut yang berjumlah Jordan Dinar J0D2,773,668.

20. Seterusnya, pada atau sekitar 06.03.2019, Plaintif telah menuntut daripada Defendan Pertama untuk membayar Kemudahan tersebut berjumlah Jordan Dinar J0D2,773,668 yang telah dilepaskan kepada benefisiari.

21. Walaubagaimanapun, Defendan Pertama telah enggan dan/atau gagal dan/atau cuai untuk membayar semula kepada pihak Plaintif keseluruhan jumlah Kemudahan tersebut yang telah dilepaskan oleh Plaintif kepada benefisiari.

22. Plaintif seterusnya telah menggunakan cagaran tunai di bawah Perjanjian Cagaran Tunai tersebut sebagai pembayaran sebahagian jumlah yang tertunggak di bawah Perjanjian Kemudahan tersebut yang gagal dibayar semula oleh Defendan kepada Plaintif.

23. Plaintif juga telah menolak tuntutan insuran risiko politik yang dituntut oleh Defendan kerana tuntutan yang dibuat tidak menepati syarat-syarat dan terma tuntutan insuran risiko politik tersebut.

24. Walaubagaimanapun, Defendan Pertama telah mengingkari terma-terma dan syarat-syarat Perjanjian tersebut di mana Defendan Pertama telah gagal untuk membuat bayaran mengikut Perjanjian Kemudahan tersebut dengan sewajarnya kepada Plaintif.

25. Plaintif telah melalui peguam caranya menyerahkan surat tuntutan dan penamatan bertarikh 15.01.2020 melalui pos berdaftar kepada Defendan Pertama dan telah membatalkan Kemudahan tersebut di bawah Perjanjian Kemudahan tersebut dan menuntut daripada Defendan Pertama pembayaran sebanyak di dalam mata wang Ringgit Malaysia RM16,312,252.05 yang masih terhutang dan kena dibayar setakat 31.12.2019, yang mana butir-butirnya adalah seperti berikut:

Item	RM
Baki Tunggakan Prinsipal	15,467,575.56
(ii) Faedah	820,718.15
(iii) Penalti	23,958.34
Jumlah	16,312,252.05

26. Defendan Pertama telah gagal, abai dan/atau cuai untuk mematuhi tuntutan Plaintif tersebut.

27. Melalui surat-surat tuntutan dan penamatan berasingan bertarikh 15.01.2020, Peguam cara Plaintif juga telah menuntut daripada Defendan Kedua dan Defendan Ketiga selaku penjamin kepada Perjanjian Kemudahan tersebut pembayaran sebanyak matawang Ringgit Malaysia RM16,312,252.05 yang masih terhutang dan kena dibayar setakat 31.12.2019, yang mana butir-butirnya seperti berikut:

Item	RM
(i) Baki Tunggakan Prinsipal	15,467,575.56
(ii) Faedah	820,718.15
(iii) Penalti	23,958.34
Jumlah	16,312,252.05

28. Namun, Defendan Kedua dan Defendan Ketiga juga telah gagal, enggan dan/atau cuai untuk mematuhi tuntutan Plaintif tersebut.

29. Oleh yang demikian, Plaintif kini menuntut terhadap Defendan-Defendan jumlah sebanyak RM16,656,410.42 setakat 30.04.2020, yang mana butir-butirnya seperti berikut:

Item	RM
(i) Baki Tunggakan Prinsipal	15,467,575.56
(ii) Faedah	820,718.15
(iii) Penalti	23,958.34
Jumlah	16,312,252.05

30. Oleh yang demikian, Plaintif kini menuntut terhadap Defendan-Defendan jumlah sebanyak RM16,656,410.42 iaitu jumlah keseluruhan baki yang terhutang setakat 30.04.2020.

31. Dan Plaintif kini menuntut terhadap Defendan-Defendan secara bersama-sama dan berasingan seperti berikut:

(i) Penghakiman bagi jumlah tertunggak sebanyak RM16,656,410.42 setakat 30.04.2020;

(ii) Faedah Keuntungan yang dikira pada kadar 2.0% p.a. di atas kadar COF ke atas RM15,467,575.56 bermula daripada 01.05.2020 sehingga penyelesaian penuh;

(iiii) Penalti yang dikira secara bulanan di atas Faedah Keuntungan tertunggak pada kadar 2.0% p.a. di atas kadar COF setahun ke atas RM15,467,575.56 bermula daripada 01.05.2020 sehingga penyelesaian penuh;

(iv) Kos tindakan ini; dan

(v) Apa-apa perintah, relif dan arahan lain yang dianggap patut dan sesuai oleh Mahkamah yang Mulia ini.

[17] From these paragraphs, it is clear that the plaintiff's claim was based on the allegations that, on or around 28 February 2019, Jordanian Kuwait Bank had made a claim of JOD2,773,668 on the bank guarantee; on or around 1 March 2019 the plaintiff had paid that sum to Jordanian Kuwait Bank; on or around 6 March 2019 the plaintiff had demanded payment of that sum from the first defendant but the first defendant had failed to pay it;

the plaintiff had then encashed the RM1,000,000 security deposit and had dismissed the defendants' claim on the insurance policy; and the plaintiff was now claiming the balance under the facility, which it alleged was RM16,312,252.05. In other words, the plaintiff's narrative was that it was a simple recovery of a term loan facility.

[18] However, to me, what was glaringly absent from the pernyataan tuntutan terpinda was any pleaded details of the term loan.

[19] Under para. 19 of the pernyataan tuntutan terpinda read with item 3 of appendix 2 to the letter of offer when the first defendant failed to pay on the plaintiff's demand issued "pada atau sekitar 6 Mac 2019", there was supposed to be a conversion of the facility from a bank guarantee from the plaintiff to Jordan Kuwait Bank to a term loan from the plaintiff to the first defendant on terms decided by the plaintiff. That would have occurred sometime in March 2019.

[20] However, that conversion was not pleaded. Further, what were the terms and conditions of the term loan, especially terms for repayment and consequences of default? What was the equivalent of JOD2,773,668 in Malaysian Ringgit that became the amount of the term loan? The plaintiff must have known these details as, according to item 3 of appendix 2 to the letter of offer, the terms and conditions of the term loan "shall be determined at the sole discretion of EXIM Bank."

[21] In my view, the issue of the term loan also cannot be treated lightly or disregarded, more so when the certificate of indebtedness which the plaintiff relies on against the defendants, namely exh. "WN-4" to its afidavit sokongan, identifies the facility as being "term loan facility of RM16,313,810.60 (conversion from bank guarantee facility of JOD2J73,668)".

[22] To compound this concern, the plaintiff's afidavit sokongan skipped altogether any mention of the claim by Jordan Kuwait Bank on the bank guarantee; the payment by the plaintiff to Jordanian Kuwait Bank; the plaintiffs demand for payment on or around 6 March 2019 from the first defendant and the first defendant's failure to pay; the encashment of the RM1,000,000 security deposit; and the dismissal of the defendants' claim on the insurance policy. Instead, the deponent went directly to the plaintiff's claim for RM16,312,252.05. Having not deposed to these matters, it naturally followed that the afidavit sokongan failed to adduce any documents of these matters.

[23] In addition, the plaintiff did not even adduce copies of the demands dated 15 January 2020 that it pleaded it had issued to the defendants in paras. 25 and 27 of the pernyataan tuntutan terpinda. It mentioned them in para. 20 of the afidavit sokongan, but that was all. This impact of this failure to adduce them is even more considering the second and third defendants'

liability under the irrevocable and unconditional joint and several guaranteed agreement is to pay on demand. Without evidence of the demand, questions naturally arise as to their liability to the plaintiff. A

[24] In my view, the plaintiff has failed to depose to let alone verify, all of the material facts of its claim on which its application is based, a mandatory requirement under r. 2(1) of O. 14 of the Rules of Court 2012. B

[25] In *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544; [2006] 2 MLJ 685, the Federal Court held that, once a plaintiff establishes that the defendant has entered an appearance, the statement of claim has been served on him, and its affidavit in support verifies the facts on which the claim is based and states the deponent's belief that there is no defence to the claim, then the burden would then shift to the defendant to raise triable issues. C

[26] It necessarily follows that, if the plaintiff does not in its affidavit in support verify the facts on which the claim is based, then that burden to raise triable issues would not shift to the defendants. D

[27] Applying that case, I hold that the plaintiff's application can and should be dismissed because it did not fully satisfy these basic conditions and prerequisites, in its failure to verify all the material facts on which the claim is based. E

Issue 2: The Issues Surrounding The Insurance Policy Provided To The Plaintiff

[28] Even though item 11(b) of Appendix 1 to the letter of offer required that the political risk insurance policy be "from an insurance company acceptable to EXIM Bank", that insurance policy was then issued by the plaintiff itself. The concerns of that are obvious; it put the plaintiff not just in the position of financier, but also in the position of being the decision-maker on claims made on the insurance policy on the facility. Theoretically, the plaintiff could decide not to honour any claim on the policy so as to claim it from the first defendant. F G

[29] It was yet again the defendants, and not the plaintiff, who had adduced evidence of the insurance policy required under the terms of the letter of offer, namely overseas investment insurance (shareholder loans) Policy No: OII/BOV/JOD/SL/2012-01 dated 29 February 2012 ("the original insurance policy"). H

[30] The original insurance policy was renewed. However, in discovery proceedings, the defendants found out about the existence of a reinsurance policy that had been entered into between the plaintiff and Asia Reinsurance Brokers (Labuan) Ltd *vide* Cover Note No. E 16 0121 dated 12 May 2016 ("reinsurance policy"). The reinsurance policy named JAF as the contracting party and named the contractual agreement as being "the military kitchen I

and dining hall operation and management agreement made between the contracting party and the foreign enterprise", a departure from the contracting party and the contractual agreement in the original insurance policy.

[31] The defendants also contended and adduced evidence of premiums totalling RM724,729.16 that it had paid to the plaintiff on the insurance policy. It meant that the plaintiff was making money from the defendants not just on the facility but also on the insurance policy.

[32] The defendants also adduced a copy of the plaintiff's demand dated 6 March 2019 which the plaintiff had pleaded in para. 20 of the pernyataan tuntutan terpinda but which it did not even aver to in its afidavit sokongan.

[33] The defendants also adduced the first defendant's letter dated 15 March 2019 in response to the plaintiff's demand dated 6 March 2019, by which the first defendant submitted a claim on the insurance policy. It said:

> As the Guarantee facility is covered under our Overseas Investment Insurance (Shareholders Loan") ("the Policy"), wherein the beneficiary is Export Import Bank of Malaysia Berhad, we hereby give you notice that we would like to make a claim on the Policy, and that the proceeds from the claim under the Policy to be used to settle the said Notice of Demand dated 6th March 2019.

[34] The plaintiff's response to the first defendant's claim on the insurance policy was almost nine months later, by a letter dated 3 December 2019. In the interim, several letters dated 26 April 2019, 3 September 2019 and 20 September 2019 were sent by the defendants' solicitors to the plaintiff, none of which the plaintiff itself referred to or adduced apart from its basic statement in para. 23 of its pernyataan tuntutan terpinda (that I have already set out verbatim in para. 15 above) of having rejected the claim.

[35] That plaintiff's response by letter dated 3 December 2019 rejecting the first defendant's claim on the insurance policy reads:

> 3 December 2019
>
> BRAHIM'S OVERSEAS VENTURES SDN BHD
> Lot 9 & 11, Jalan P/9B, E-MAIL/COURIER
> Kawasan Perusahaan Bangi
> 43650 Bandar Baru Bangi
> Selangor
> Attn: Dato' Seri Ibrahim bin Haji Ahmad, Chairman
>
> Dear Sir,
>
> Overseas Investment Insurance (Shareholder Loans OII/BOV/JOD/SL/2016-01)
> Insured : Brahim's Overseas Ventures Sdn Bhd
> Contracting Party: Jordanian Armed Forces, Kingdom of Jordan

We, EXPORT-IMPORT BANK OF MALAYSIA BERHAD [Company No. 357198-K] (hereinafter referred to as "EXIM Bank") refer to the above matter regarding the submission of claim on the account of the abovementioned Contracting Party. We have examined your claim on the basis of afl documentary evidence tendered in support of the claim and other information available in our files wherein our findings are as follows:

1.1 Overseas Investment Insurance (Oil) (Shareholder Loan) Policy (Article G Breach of Contract)

A. Under Article 1, Clause G Breach of Contract of Oil (Shareholder Loan) Policy

The condition stipulated under Article 1, Clause G - only comes into operation in the event where the breach of the agreement was due to the act of the Contracting Party *ie*, the Jordanian Armed Forces, Kingdom of Jordan (JAF) under the Contractual agreement, (the Military Kitchen and Dining Hall Operation and Management agreement made between the JAF and Arab Ready Meals (ARM)),

Based on our claim assessment, Brahim's Overseas Ventures Bhd (BOV) has failed to justify the act of breach of contract and the right contracting party. King Abdullah II Design and Development-Bureau (KADBB) was not the contracting party as provided under the Oil Policy.

B. No Act of Breach of Contract by the Contracting Party - JAF as required under Article 1, Clause G - Breach of Contract - Oil Policy

Another issue that was raised by BOV was that JAF did not renew the agreement and as such JAF has breached the Military Kitchen and Dining Hall Operation and Management agreement (the agreement), According to the agreement, the Concession Period is for a period of two (2) years, after which the concession shall continue for another one (1) year. The fact that there is no renewal by JAF and there is no evidence to the contrary, therefore the Concession agreement had expired and there is no longer any existing contract between JAF and ARM. In such event, we would like to reiterate that under no circumstances shall an act of breach come into an existence when there is no existing contract to begin with.

C. Clause 3.2 of the Military Kitchen and Dining Hall Operation and Management agreement - Extension of Concession Period

Furthermore, under Clause 3.2 of the above agreement, JAF has full discretion whether to extend the Concession Period or otherwise subject to JAF being satisfied with the performance of ARM.

Based on the above, there is no evidence of breach of contract as JAF being the Contracting Party is entitled to exercise its discretion in not renewing the agreement as they deem fit.

As such, pursuant to the above, we regret to inform you that the Export-Import Bank of Malaysia Berhad is unable to admit liability on the said claim.

A FOR THE AVOIDANCE OF DOUBT, all our rights are expressly reserved and shall not be deemed to be limited and/or prejudiced by the contents of this letter.

[36] The first defendant, through its solicitors, then sent several letters to the plaintiff and/or its solicitors objecting to the plaintiff's rejection of the B first defendant's claim on the insurance policy. These letters were dated 23 January 2020, 24 January 2020, 30 January 2020, 17 February 2020, 22 July 2020, 31 July 2020, 27 August 2020, 28 October 2020, 12 November 2020 and 17 November 2020. In simple terms, the first defendant's stand was that the plaintiff wrongfully applied the military C kitchen and dining hall operation and management agreement and had wrongfully rejected the claim.

[37] While these letters were being sent, on 12 June 2020 the plaintiff filed the writ in this action against the defendants.

D **[38]** The first defendant's objections to the plaintiff's rejection of the first defendant's claim on the insurance policy was that the rejection was premised on the wrong footing and is therefore mistaken and invalid. This is because the contracting party with the first defendant was KADDB and not the JAF, as stated in the original insurance policy, and that the plaintiff's rejection of the claim was on the basis that the contract on which the insurance policy E is based is "military kitchen and dining hall operation and management agreement". The defendants called this act as being a mistake, a misnomer and inapplicable.

[39] In para. 45 of its re-amended defence, set-off and counterclaim dated 15 February 2022, the defendants therefore sought the following relief:

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1. A declaration that upon the true construction of the Overseas Investment insurance policy No: OII/BOV/JOD/SL/2016-01 for the period between 01.03.2016 to 28.02.20W9, the plaintiff is liable to indemnify the first defendant in respect of the plaintiff's claim herein for a sum of RM16,656,410.42;

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2. A declaration that the plaintiff should seek to enforce their legal rights pursuant to the terms of the Reinsurance Policy prior to enforcing any of the Security Documents against the defendants:

3. In the alternative and pursuant to Sections 30 and 33 of the Specific Relief Act 1950:

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(a) rectification of the Overseas Investment Insurance Policy No: Oll/BOV/JOD/SU2016-01 for the period between 01.03.2016 to 28.02.20169 by substituting the words:.

(i) Jordanian Armed Forces" with "King Abdullah II Design and Development Bureau (KADDB)" in item-13. Contracting Party thereof: and.

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(ii) The Military Kitchen and Dining Hall Operation and Management agreement made between the Contracting Party and the Foreign Enterprise" with "Joint Venture agreement between BOV and KADDB (50/50 JV) to set up Arab Ready Meals PSC (ARM)" in item 14. Contractual agreement thereof.

(b) specific performance of the Overseas Investment Insurance Policy No: OII/BOV/JOD/SU2016-01 for the period between 01.03.2016 to 28.02.20149 as rectified.

4. The sum of RM1,000,000 being the return of the Security Deposit on account of the set-off and extinction of the revolving bank guarantee facility pursuant to the "Perjanjian Kemudahan tersebut".

5. Damages for conversion and unlawful retention of the Security Deposit as Constructive Trustee under the cash collateral agreement.

6. Interest on the Security Deposit of RM 1,000,000 at two per centum (2.00 %) above the plaintiffs Cost of Funds and continuing for conversion and unlawful retention of the said Security Deposit as Constructive Trustee.

7. costs.

8. Alternatively, any other relief which this Honourable Court deems appropriate and just in all the circumstances of this case.

[40] In their written submissions, opposing the plaintiff's application, the defendants contended that the following issues needed to be determined at the full trial of the claim and the set-off ("the defendants' issues"):

(i) whether the plaintiff ought to have utilised the insurance policies first before calling on the guarantee agreement;

(ii) whether the guarantors are statutorily entitled to exercise their rights under s. 94 of the Contract Act 1950 ("CA 1950") to first exhaust the securities which the plaintiff has against the first defendant before reimbursing the plaintiff the alleged outstanding sum, if any, which is denied;

(iii) whether there is a misnomer in the renewed insurance policies which was due to the improper and/or wrongful unilateral act of the plaintiff which the plaintiff now seeks to take advantage of;

(iv) whether the insurance policies were valid as at the date of loss, therefore the plaintiff ought to have made a claim under the same and/or the reinsurance policy. This would have absolved the defendants of all liabilities;

(v) whether the insurance policies ought to be construed in accordance with the established principles of contract of insurance. The plaintiff being the insurer of the insurance policies ought not to be allowed to

conveniently ignore the insurance policies, rendering redundant all the premium amounting to USD724,729.16 paid by the first defendant in respect of the insurance policies;

(vi) whether the plaintiff had, at all material times, an irrevocable power by way of a power of attorney to renew the insurance policies, which the plaintiff had previously exercised. The plaintiffs conduct in failing to renew the insurance policies on or before 28 February 2019, after the date of loss on 8 November 2018, appears to be questionable; and

(vii) whether the plaintiff's overall conduct and/or contractual agreement examined *in toto* highlights the unconscionability on the part of the plaintiff wherein the plaintiff is the only party profiting from the insurance premium paid by the first defendant of USD724,729.16 which the plaintiff elected to not utilise despite having the means to do so, to resolve the matter.

[41] In response, the plaintiff essentially contended that its application for summary judgment should still be allowed notwithstanding the defendants' issues because:

(i) its rejection of the first defendant's claim on the insurance policy was valid;

(ii) the first defendant's claim on the insurance policy was made after it had expired on 28 February 2019; and

(iii) the defendants' allegations amounted to a counterclaim against the plaintiff's claim, which meant that the plaintiff's application for summary judgment could still be heard and determined and that judgment on it could still be granted.

[42] In my view, it is not as simple as the plaintiff contends.

[43] Firstly, the plaintiff's claim against the defendant is based on the claim that the Jordan Kuwait Bank made on the bank guarantee. The details of that claim need to be explored, more so when the only evidence the plaintiff adduced of Jordan Kuwait Bank's claim on the bank guarantee is in the plaintiff's letter dated 6 March 2019 in which the plaintiff said "please be informed that we are required to make payment to the beneficiary ... was payment actually made ..." Where is the evidence of it?

[44] Secondly, the first defendant had made a claim on the renewed policy upon being on being notified by the plaintiff of Jordan Kuwait Bank's claim on the bank guarantee. The proceeds under the renewed policy would have adequately covered Jordan Kuwait Bank's claim on the bank guarantee, thereby wholly exonerating the defendants of any further liability. It would therefore be a set-off, not a counterclaim.

[45] Thirdly, whether or not the plaintiff was correct in rejecting the first defendant's claim on the insurance policy also needs to be explored further and is not something that can be determined summarily on affidavit evidence.

[46] Fourthly, in its letter dated 3 December 2019 rejecting the first defendant's claim on the insurance policy, the plaintiff never contended that the insurance policy had expired. Was it therefore an allegation made in afterthought?

[47] Fifthly, even if the insurance policy had expired, the defendants had relied on the following cases that do not make expiry a sole ground for rejecting a claim, more so when the party taking out the insurance policy had made substantial policy payments to the insurer.

[48] In *The Pacific Bank Bhd v. Kerajaan Negeri Sarawak* [2015] 3 CLJ 717, Zainun Ali FCJ said (in paras. 152 to 154 of the judgment):

> A factor which is often neglected is this: that insurance contracts are *uberrimae fidei contracts* - (*ie*, contracts of "utmost good faith").
>
> As the Court of Appeal stated clearly in *Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 CLJ 1; [2006] 1 MLJ 710:
>
> ... It is settled beyond dispute that a contract of insurance is one that imposes a mutual duty on the parties to it to act *uberrimae fidei* towards each other.

[49] Based on that case, I believe that the defendants' contention that, as the plaintiff had obtained substantial premium payments in exchange for their insurance coverage, it would be in bad faith for it to avoid liability by putting a time limit for which a claim on their undertaking has to be made, is deserving of further inquiry.

[50] So too is deserving of further inquiry the defendants further contention that the insurance policy ought to be construed in accordance with the established principles of contract of insurance and not one of guarantee, and that if the plaintiff is allowed to conveniently ignore it, then the very purpose of the first defendant being required to procure the insurance policy and pay all of those premiums would be rendered redundant and meaningless.

[51] Also deserving of further inquiry is the defendants other contention that the plaintiff ought to have exhausted its remedy on the insurance policy even before having recourse to the first defendant under the facility agreement and against the second and third defendants under the guarantee & indemnity, and that the latter are entitled to exercise their statutory rights under s. 94 of the Contracts Act 1950 to require the plaintiff to exhaust those other securities first.

[52] In respect of the plaintiff's contention that the insurance policy had expired when the claim was made, I am of the view that the defendants' following contentions mean that that need not be true and that this issue also needs to be investigated further:

(i) the insurance policy was entered into to cover the breach of the JVA between the first defendant and KADDB;

(ii) KADDB breached its contract with the first defendant in failing to procure the orders from JAF pursuant to cl. G of art. 1 of the JVA;

(iii) the date of loss is 8 November 2018, being the last date by which KADDB and/or KIG should have produced/manufactured/delivered the products pursuant to cl. 9.2 of the JVA;

(iv) the last renewed policy was for the period from 1 March 2018 to 28 February 2019, wherein a premium of USD82,153.94 was paid by the first defendant;

(v) consequently, the date of loss was within the lifetime of the last renewed insurance policy;

(vi) pursuant to the letter of offer and the deed of assignment, the first defendant has assigned all its rights, titles and interest of the insurance policy to the plaintiff, and under cl. 3 thereof the plaintiff could have easily renewed it without the first defendant. The plaintiff had already done so for the previous renewals, so there was no reason why it could not do so again.

[53] Last but in no way least, when items 14 and 15 of the original insurance policy referred to the contracting party as KADDB, and mentioned the contractual agreements as being the joint-venture between the first defendant and KADDB through ARM, and also makes reference to the loan from Jordan Kuwait Bank and the plaintiff's bank guarantee to Jordan Kuwait Bank, then I also believe that yet another crucial issue that needs to be explored is how the renewed policy then came to change that and refer to the contracting party as JAF and the contractual agreement as "the military kitchen and dining hall operation and management agreement made between the contracting party and the foreign enterprise". This is more so when the documents contemporaneous with the facility, namely the letter of offer, the facility agreement, the guarantee & indemnity, the deed of assignment and the cash collateral agreement (under which the fixed deposit of RM1,000,000 was placed) clearly referred to the joint-venture between the first defendant, KADDB, to ARM, to the loan from Jordan Kuwait Bank to ARM, and to the bank guarantee.

[54] The defendants' further contention that, upon receiving the notice of the claim by Jordan Kuwait Bank, the plaintiff could and should have just made a claim under the reinsurance policy against Asia Reinsurance Brokers (Labuan) Ltd and not against the defendants herein, is also something that needs further inquiry. This is all the more so when such a claim, if honoured, would have fully satisfied the plaintiffs claim, absolved the defendants from all liability to it, and obviated the need for this action.

[55] In light of all these matters, the issue of the insurance policy cannot be determined in a summary manner, more so when all the plaintiff pleaded on it was that vague para. 23 of its pernyataan tuntutan terpinda.

Conclusion

[56] All in all, it was not a clear-cut case and unsafe to grant judgment summarily.

[57] It is for all these reasons that I dismissed the plaintiff's application for summary judgment, with costs of RM5,000 subject to allocator.